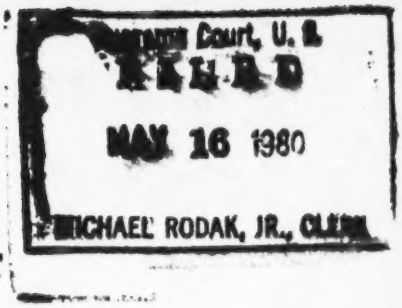

IN THE SUPREME COURT

OF THE UNITED STATES

No. 79-1821

IN THE MATTER OF JOHN A. KESLER

Petition for a Writ of Certiorari
to the Supreme Court of Indiana

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OPINION BELOW

The opinion of the Supreme Court of Indiana (Appendix A, infra) is not yet officially reported. An unofficial report appears at 397 N.E. 2d 574.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on November 15, 1979. (Appendix A, infra). Petitioner filed a "Petition for Rehearing, Request for Reconsideration and Request for Oral Argument", which was denied on February 20, 1980. (Appendix A, infra). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Whether Petitioner, John A. Kesler, was disbarred by the Supreme Court of Indiana without due process and without equal protection of the laws, in light of the facts that the Court imposed this penalty upon Petitioner without the guidance of any standards and that, the Supreme Court acting as a trial court in this matter, its action was not subject to review.

CONSTITUTIONAL PROVISION AND DISCIPLINARY RULES INVOLVED

Amendment Fourteen to the Constitution of the United States; Disciplinary Rules 1-102 (A) (4) and (6), 7-101 (A) (3), and 9-102(A) of the Code of Professional Responsibility; and Admission and Discipline Rule 23, Sections 1 and 3 (a) are set forth in Appendix B, infra.

STATEMENT

Petitioner has been a practicing member of the bar of the State of Indiana since 1951.

Petitioner was charged by the Indiana Supreme Court Disciplinary Commission with professional misconduct in the course of the administration of a decedent's estate. The Disciplinary Commission prosecuted the matter before a hearing

officer appointed by the Supreme Court. The Hearing Officer made adverse findings of fact, which were reviewed by the Supreme Court. The Supreme Court found Petitioner to be in violation of three disciplinary rules of the Code of Professional Responsibility, and disbarred him on November 15, 1979. Petitioner sought reconsideration, which was denied by the Supreme Court on February 20, 1980.

The facts are that Petitioner and one John L. Smith were appointed co-executors of the estate of Elsie M. Grammer on April 2, 1973. Except for a small specific bequest, Smith was the sole beneficiary of the estate which was worth around $100,000.00.

Smith desired a partial distribution to himself before the estate was ready for closing, but Petitioner feared that decedent may have made transfers to Smith before her death and that additional estate tax liabilities could arise.

Therefore he consulted a CPA for advice about how to protect himself as co-executor against that possibility, and the latter approved Petitioner's suggestion that one-third of any withdrawal from the estate be held by Petitioner in escrow until final clearance of the estate by

the tax authorities. Petitioner also talked to the Circuit Court Judge who had jurisdiction of the estate about holding some of the money in escrow pending final settlement.

In October, 1973, the co-executors filed a "Petition for Partial Distribution" in the amount of $45,000.00. The partial distribution was drawn in two checks payable to Smith, one for $30,000.00 and one for $15,000.00. Smith kept the former and, after endorsing the latter, gave it to Petitioner. Petitioner owned government securities which he placed in a safety deposit box in the amount of $15,000.00, attaching an escrow document thereto which he had signed indicating that the securities were property of the estate. Three additional withdrawals from the estate at Smith's behest during 1974 and 1975, in the respective amounts of $7,500.00, $15,000.00, and $15,000.00, were handled similarly, with Petitioner obtaining one-third of each distribution from Smith and placing government securities in the safety deposit box or in his office safe as substitutes for the money. Petitioner admittedly then used the money totaling $27,500.00 as his own. Smith never objected to this

procedure nor did he ever ask Petitioner for the money.

Both Petitioner and Smith signed the final report which was filed on November 19, 1975, and set for hearing on December 10, 1975. Smith went to the Courthouse, apparently expecting an open court hearing, and while talking to the probate commissioner, was advised by the latter, a personal foe of the Petitioner, to file objections to the final report if he hoped to get his money back from Petitioner. The probate commissioner prepared objections which Smith signed, and the same became disciplinary charges against Petitioner, which Smith also signed. When Petitioner received notice of the objections, he informed Smith that his money was available to him any time. Petitioner prepared, and on December 17, 1975, filed a "Verified Stipulation of Facts and Dismissal of Objection to Final Report" signed by Smith. The Court approved the Final Report and on the same day, Smith received from Petitioner the full principal amount of $27,500.00 which Petitioner had held in escrow. Smith sought to withdraw the disciplinary charges he had signed, but the Disciplinary Commission refused to allow it.

The Supreme Court of Indiana held that Petitioner had violated Disciplinary Rule 9-102(a) by commingling the funds received from the estate with his own funds, rather than depositing them in a separate account; that he had violated Disciplinary Rule 1-102(a) (4) and (6) by omitting any mention of the escrow agreement from his "Petition for Partial Distribution", thereby making a misrepresentation to the Court; and that he had violated Disciplinary Rule 7-101 (A) (3) by diverting income producing assets from the estate to his own personal benefit.

The general lack of standards and vagueness in the Disciplinary Rules, as well as the structure of the office of those charged with enforcement of the Disciplinary Rules were challenged on constitutional grounds in Item V of Petitioner's Answer to the Verified Complaint filed against him. The Hearing Officer did not address this matter, and Petitioner complained of this in Item V of his petition to the Supreme Court for review of the Hearing Officer's findings of fact and conclusions of law. The Supreme Court likewise ignored it.

Petitioner having taken the position that he was not guilty of unprofessional or unethical conduct, the question of the arbitrariness of the Supreme Court's decision to disbar Petitioner did not arise until that decision was issued on November 15, 1979. Petitioner then filed his "Petition for Rehearing, Request for Reconsideration and Request for Oral Argument." Part II thereof (pages 7-11) entitled "Discussion of the Penalty", was entirely devoted to a discussion of the unfairness of the penalty imposed upon Petitioner, in the light of many other decided disciplinary cases, some of which are also mentioned in this Petition, infra. At this point, a "Joinder in Petition for Reconsideration and Brief By Amicus Curiae" was also submitted to the Supreme Court. This was a thirty-four page document entirely devoted to an analysis of the penalties imposed in prior disciplinary cases, and contending that the penalty drawn by Petitioner was entirely out of proportion and unfair when compared to those prior cases.

On February 20, 1980, the Supreme Court denied both the Petition for

Rehearing, Request for Reconsideration, and Request for Oral Argument and the Joinder in Petition for Reconsideration and Brief By Amicus Curiae without comment. See Order Denying Relief (Appendix A, infra).

REASONS FOR GRANTING THE WRIT

In Konigsberg v. State Bar of California, 353 U.S. 252 (1957), this Court reversed a denial by the Supreme Court of California of Konigsberg's petition for review of a decision by the State Committee of Bar Examiners refusing to certify him for admission to the bar. This Court upheld Konigsberg's contention that the decision of the State Committee violated the Fourteenth Amendment and deprived him of "life, liberty, or property, without due process of law" as well as "the equal protection of the laws." In the course of its opinion, this Court said (353 U.S. at 257-258):

> While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

If refusal to admit a young man to the bar has grave consequenses for him at an age when he can easily enter another occupation, the disbarment of a lawyer who has practiced for twenty-eight years has relatively more grave consequences for him. For the latter, in his middle fifties and too young to qualify for social security, must necessarily start over in some other occupation for which he is not trained and is at the same time too old to be wanted as a trainee by any employer.

Like the refusal of the Supreme Court of California to admit Konigsberg to its bar, the disbarment of Petitioner here by the Indiana Supreme Court constituted a violation of the Fourteenth Amendment. The Indiana court found Petitioner to have committed certain unprofessional and unethical acts --- acts which have frequently been committed and considered before by the Court. An examination of those prior cases demonstrates that the penalties imposed by the Court in the past for essentially similar conduct range all the way from reprimand through suspension for varying periods of time to permanent disbarment. This free rein is authorized by Admission and Discipline

Rule 23 (Appendix B, infra) which provides as follows in Section 3:

> (a) One of the following types of discipline may be imposed upon any attorney found guilty of misconduct: permanent disbarment from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite or an indefinite period from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite period, not to exceed six months, from the practice of law with provision for automatic reinstatement upon such conditions as the Court shall specify in the order of suspension; a public reprimand; or a private reprimand.

Petitioner drew the ultimate penalty.

The basic cause of this egregious inequality of treatment inflicted upon Petitioner as compared to that meted out to others is that the Supreme Court of Indiana determines penalties in these situations completely without any objective standards to lay hold of. As the membership of the Court changes over the years, each new judge finds himself completely free to vote for exoneration, reprimand, suspension, or disbarment of an accused lawyer, as the spirit moves him and without regard to objective standards or the treatment of similar conduct by an earlier panel of Supreme

Court judges. The opinion in the present case does not even purport to rely on any objective standard or authority in imposing the ultimate penalty of disbarment. Indeed the Court rejects one consideration upon which it had previously relied in mitigation of penalties, the fact that "many fine citizens and highly respected members of the Bar of Indiana had recounted the past accomplishments of Petitioner and asked this Court for leniency." Compare Matter of Thornburg, ___Ind.___, 381 N.E. 2d 855 (1978); Matter of Fuchs, 264 Ind. 173, 340 N.E. 2d 762 (1976). And one judge exercising this same unconstrained discretion, stated that, in his view, a penalty of suspension for not less than three years would be appropriate. Nowhere else in the law, we submit, does a court's penalizing power run the gamut from reprimand to permanent deprivation of liberty or property without constraint, and --- in view of the fact that the Indiana Supreme Court sits as a trial court in these matters [1] --- without review.

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[1] Matter of Murray, 266 Ind. 221, 362 N.E. 2d 128 (1977); Indiana Constitution, Article 7, Section 4.

In their dissenting opinion in McGautha v. California, 402 U.S. 183, 270 (1971), three justices of this Court said:

> "* * * due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected."

The Court there was speaking of the absolute discretion then given to juries in California and Ohio to impose the death penalty for murder.

In Furman v. Georgia, 408 U.S. 15 (1972), which four justices of this Court believe to have overruled McGautha,[2] this Court held that the death penalty does indeed violate due process when its exercise is left to the untrammeled discretion of the jury; for that allows the penalty to be inflicted arbitrarily and discriminatorily. The integrity of judges is not impugned by recognizing that as human beings, they too may be capable of arbitrary conduct if not subject to some standards and some restraints other than their own

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[2]See dissenting opinion of Mr. Chief Justice Berger at 408 U.S. 238, 401

consciences[3] --- especially when those judges appoint both the Disciplinary Commission which investigates and prosecutes the proceeding and the Hearing Officer who makes the initial findings, then themselves sit both as trial court and court of last resort to decide the case.

In the Furman case, Mr. Justice Stewart, concurring, said that the death sentences there imposed on the petitioners were cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all the many people convicted of rapes and murders, those petitioners were among a capriciously selected random handful upon whom the death sentence was imposed. The same principle applies to the disbarment of Petitioner in the present case.

The arbitrary and discriminatory nature of the disbarment of Petitioner is clearly demonstrated by comparison with the case of Matter of Fuchs, 264 Ind. 173, 340 N.E. 2d 762, decided by the Supreme Court of Indiana on February 3, 1976, which was

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[3]See dissenting opinion of Mr. Justice Rehnquist at 408 U.S. 238, 468-469

after the acts done by Petitioner in the present case. In Fuchs, the lawyer settled a personal injury case on behalf of his client for $60,000.00 on May 24, 1972. Half of this settlement was the client's money, but the attorney commingled it all with his own funds, and used it for his own personal purposes during nearly seven months while the client repeatedly demanded it from him without success. On December 11, 1972, the lawyer paid his client by means of a post-dated check which the bank returned on account of insufficient funds. Finally, on December 21, 1972, the check was honored. The Supreme Court of Indiana deplored this conduct, while imposing a penalty of suspension on the lawyer for a period of not less than ninety days. The Supreme Court explained its action by admitting that it had been lax in disciplinary matters until then, and that many otherwise competent and ethical lawyers had on that account become careless and arrogant. In the future, warned the Court, sanctions for such conduct would be more severe.

In the present case, the Indiana Supreme Court has validated its warning. The trouble is that Petitioner here, who

always separately maintained government securities as a substitute for the money he commingled, who was never asked for the money by his client until the Final Report of the administration of the estate was filed, who as co-executor was not required to invest funds on behalf of the estate under Indiana law,[4] and who returned the money to his client promptly on demand, did not have the benefit of the Fuchs opinion in 1973, 1974, and 1975, when he did the acts that he did. Thus it appears that Fuchs was suspended for ninety days and Petitioner was disbarred, due to the fortuitous circumstance that Fuchs' case reached the Court first. It is simply not fair for the Court to issue a warning in 1976, slap that offender's hand, and then disbar this Petitioner in 1979 for similar conduct in which he engaged before the warning was issued. In the words of Mr. Justice Stewart, Petitioner has suffered cruel and unusual punishment in the same way that being struck by lightning is cruel and unusual punishment.

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[4] Matter of Noel, 265 Ind. 98, 350 N.E. 2d 623 (1976).

Now it is also true that the Indiana Supreme Court found Petitioner to have made a misrepresentation to the Probate Court by filing a Petition for Partial Distribution without mentioning in it the escrow arrangement which Petitioner had with his client. Thereby, said the Supreme Court, Petitioner violated Disciplinary Rule 1-102 (A) (4) and (6). But if it is this element of the case which is thought to justify disbarment, it should be compared with Matter of Garrett, ___Ind.___, 377 N.E. 2d 1368, 1369 (1978). There, an attorney for an estate successfully petitioned for his fee on November 10, 1959, representing to the Court that all that remained to be done was to "wind up the affairs of the estate preparatory to making final distribution and the closing of said estate ....." In point of fact, the attorney did not wind up or distribute the estate, did not respond to his client's inquiries, and allowed the court to revoke the Letters of Administration and close the estate in 1975 without notifying his clients. For this conduct, plus deceit and misrepresentation to other clients, the attorney was suspended from practice for a period of not less than

one year.

It is not our intention to burden this Petition with additional cases. Obviously there are many, and their results are as disparate as those cited herein. If examined by this Court upon grant of our Petition for Certiorari, they will demonstrate further what we do not believe can be denied, i.e., that penalties for misconduct are imposed upon lawyers arbitrarily --- not unconcernedly and not, we are sure, without judicial soul searching --- but without the guidance of objective standards that inhere elsewhere in our law, and without the safeguard of appellate review designed to assure adherence to those standards.

We urge this Court, in deciding whether to accept the above constitutional issues on Certiorari, to note that the Supreme Court of Indiana has not only imposed an arbitrary penalty on Petitioner, but has done it by setting aside the precepts of collateral estoppel as well. Thus on December 17, 1975, the judge of the Vigo Circuit Court who was supervising the Estate of Elsie M. Grammer issued the following "Order Dismissing Objection to Final Report in the Matter of The Estate of Elsie M. Grammer, deceased":

Comes now John L. Smith and John A. Kesler, both in person, and John L. Smith files his Verified Stipulation of Facts and Dismissal of Objection to Final Report, and John A. Kesler moves for hearing on the said John L. Smith's original affidavit which the Court treated as an Objection to Final Report, and the subsequent discharge thereof. Witnesses sworn, evidence heard thereon, and the Court being duly and fully advised in the premises finds that by consent and agreement the co-executors made various partial distributions to John L. Smith on the express condition that 1/3 of any such monies taken out of the estate for partial distribution to Smith be held by Kesler for his protection against personal loss in case taxes or other demands upon the estate left insufficient money to pay the same after said partial distribution was made, which method of handling the same the Court finds was a legitimate and proper protection which Kesler had the right to require and which Smith consented to and the Court finds the same to be a proper and acceptable way of handling said situation and that Kesler has carried it through as agreed upon with Smith. The Court further finds that Kesler has now paid over to Smith all of said money which Kesler had been holding for security as aforesaid, and the said John L. Smith acknowledges receipt of the same in full and

open court. The Court finds that all doings of John A. Kesler herein were proper and honest and the same are hereby approved, and the Court further finds that Kesler has accounted for all money due the said John L. Smith and that there is no merit to John L. Smith's Objection to Final Report and the same should be overruled and dismissed with prejudice. The Court finds against John L. Smith on his said objection.

It is therefore ordered that all conduct and actions of John A. Kesler herein in all his dealing with John L. Smith herein were proper and honest and are hereby approved; further, that John L. Smith's Objection to Final Report is without merit and is hereby overruled and dismissed with prejudice.

s/ C. Joseph Anderson
C. Joseph Anderson, Judge
of the Vigo Circuit
Court

There was no appeal in the matter of the estate of Elsie M. Grammer. Therefore the judgment of the Vigo Circuit Court therein became final, and by the Indiana Supreme Court's own words, is entitled to full faith and credit by courts of coordinate jurisdiction as well as by the Supreme Court itself. Steenburg v. Kyle, 188 Ind. 26, 121 N.E. 537, 538 (1919). Yet the Supreme Court, through its Disciplinary Commission, has prosecuted Petitioner, and through its judges, has decided that the essential facts found by the Vigo Circuit Court as the basis of its judgment that the estate of Elsie M. Grammer was properly administered and closed are not correct and should not be given full faith and credit. This Court itself has held that such essential facts, once litigated and determined, are conclusive in a subsequent proceeding even though the cause of action is different. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 601 (1948). See also Partmar Corp. v. Paramount Pictures Th. Corp., 347 U.S. 89 (1954).

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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May 1980

APPENDIX A

1. Opinion of the Supreme Court of Indiana

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF)
) Cause No. 877 S 602
JOHN A. KESLER)

November 15, 1979

DISCIPLINARY ACTION

PER CURIAM

This proceeding is before the Court on a Verified Complaint for Disciplinary Action filed by the Indiana Supreme Court Disciplinary Commission pursuant to Admission and Discipline Rule 23, Section 12. Under the procedures set forth in Admission and Discipline Rule 23, this Court appointed a Hearing Officer, a hearing was held and the Hearing Officer has filed Findings of Fact relative to the allegations raised in the Verified Complaint. Respondent

now petitions this Court for review of the Hearing Officer's findings. Both parties have filed briefs and a Brief of Amicus Curiae has been received and considered by this Court. Additionally, Respondent has requested oral argument, which is now denied.

In his Petition for Review and Brief, the Respondent has raised several issues of a general nature challenging the validity of this disciplinary proceeding. These matters must be resolved before assessing the evidence of unethical behavior presented in this case.

Respondent asserts that the charges raised in the complaint should have been dismissed in that the alleged professional misconduct was the subject matter of a previous proceeding in the Vigo Circuit Court. Respondent contends that the doctrines Res Judicata and Estoppel by Judgment preclude the relitigation of these issues.

The Verified Complaint filed in this cause charges the Respondent with professional misconduct in the course of the administration and distribution of the Estate of Elsie M. Grammer. The complainant who brought this matter to the attention of the Disciplinary Commission

was the primary beneficiary under the estate, John L. Smith. At approximately the same time Mr. Smith forwarded his grievance, he filed his objections to the Final Report in the Grammer estate. The later pleading was eventually dismissed by the Judge of the Vigo Circuit Court pursuant to a Verified Stipulation of Fact tendered by Mr. Smith to the Court. Respondent now argues that by accepting this stipulation, the Vigo Circuit Court adjudicated the facts and issues now before this Court under the present disciplinary proceeding.

The argument presented by Respondent fails to recognize that the Vigo Circuit Court did not have jurisdiction to resolve the issues now before this Court.

The Constitution of the State of Indiana vests this Court with exclusive jurisdiction in matters involving the admission and discipline of attorneys. Indiana Constitution, Article 7, Section 4. By reason of this constitutional duty, this Court has adopted substantive standards of performance and procedures for the adjudication, as an Original Action in this Court, of alleged misconduct. The distinction between the authority of this Court in disciplinary matters and the

validity of a trial court's judgment has prompted this Court to note on several occasions that professional misconduct by the members of the Bar of this State is to be determined independent from criminal or civil matters out of which allegations of misconduct may arise. In re Mann, (1979) ___Ind. ___, 385 N.E. 2d 1139; In re Crumpacker, (1978) ___Ind.___, 383 N.E. 2d 36; In re Wireman, (1977) ___Ind.___, 367 N.E. 2d 1368, cert. denied, 56 L.Ed.2d 402. Thus, while the Vigo Circuit Court had authority to determine and resolve the issues raised by reason of objections filed by Mr. Smith, it was without authority to bind this Court to a decision embracing professional misconduct. The evidence presented in this cause indicates that the decision by the Vigo Circuit Court did not purport to invade the province of this Court.

In view of the above considerations, we now find that the Hearing Officer did not err in denying Respondent's Motion to Dismiss. We further find that Respondent's assertion, as raised in his Answer and Petition for Review, to the effect that the determination of the Vigo Circuit Court precludes consideration of allega-

tions of misconduct charged under this complaint, is without merit.

Respondent has also argued that he was twice placed in jeopardy by reason of the Vigo Circuit Court's consideration of the objections and this Court's disciplinary procedure. Double jeopardy is a constitutional doctrine applicable in criminal proceedings; a disciplinary action under Admission and Discipline Rule 23 is not a criminal proceeding. Accordingly, we now find that the assertion of double jeopardy is also without merit.

In his Petition for Review the Respondent specifically incorporates several additional paragraphs of his Answer challenging the constitutionality of this proceeding. Respondent argues that he should have been afforded an opportunity to personally appear before the Disciplinary Commission prior to the Commission's decision to file a complaint in this cause. He asserts that the failure to allow this meeting was a denial of due process.

Respondent has not cited, nor are we aware of, any authority to support Respondent's argument. The procedures set out in Admission and Discipline Rule 23 provide

for an appropriate notice and hearing at which time an individual can confront those making allegations against him and raise matters in defense. These rules meet the requirements of due process. See, In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed. 117, reh. denied, 391 U.S. 961, 88 S. Ct. 1833, 20 L.Ed. 874; In re Wireman, Supra; In re Murray, (1977) ___Ind.___, 362 N.E. 2d 128. Additionally, Respondent has not shown any prejudice by reason of the lack of a hearing with the Disciplinary Commission prior to the filing of the complaint. In light of these considerations, we find no constitutional infirmity in the proceedings under this cause.

The other issues incorporated from Respondent's Answer are the assertions that this proceeding denied him his constitutional right to enter into a private contract with Mr. Smith and that the disciplinary process and various provisions of the Code of Professional Responsibility are unconstitutionally vague. These issues, however, are raised in a general manner and not supported by specific argument or any citation of authority. We, accordingly, find that these issues, as they stand without

sufficient specificity, do not present an issue for determination by this Court.

In another portion of his Petition for Review the Respondent claims that he did not receive a fair hearing before the Hearing Officer. It is asserted that the Hearing Officer was biased and prejudiced against the Respondent, that politically slanted news accounts prevented a fair hearing, that "leaks" of information to the press precluded fair consideration, and that the Disciplinary Commission did not serve Respondent with a copy of the Commission's proposed findings.

In support of his allegation of bias and prejudice, the Respondent sets forth the Hearing Officer's decisions concerning the credibility of witnesses, the denial of a continuance, and the adoption of the Commission's proposed findings. The Respondent, however, has not pointed to any evidence in addition to these decisions. If adverse rulings and findings, without additional corroboration, could establish bias or prejudice, this Court would never be able to affirm a determination in any type of review. Accordingly, we must find the evidence in this cause insufficient to support a finding of bias or prejudice.

We further find that Respondent's assertions that press coverage of this matter, alleged "leaks" of confidential information, and the failure of the Commission to serve a copy of proposed findings do not demonstrate error in these proceedings. Respondent contends that certain events transpired and that the news coverage of these proceedings led to his defeat in a political campaign, but he has not shown nor does the record demonstrate that these alleged events improperly influenced the Hearing Officer or created an environment in which a fair hearing could not be conducted. We further note that it is this Court and not the Hearing Officer which makes the ultimate determination of fact in a disciplinary proceeding. In re Crumpacker, Supra; In re Murray, Supra. It being our responsibility to make such decisions we note that the extra judicial circumstances related by the Respondent are not relevant to our determination.

In the remaining portion of his Petition for Review, the Respondent asserts error in the Hearing Officer's findings and argues that this Court should arrive at certain factual and legal conclusions by reason of the evidence of record. These

issues will be resolved through this Court's determination of what acts were done by the Respondent and whether or not this conduct constitutes a violation of the Code of Professional Responsibility.

As previously noted, the Respondent is charged with unethical behavior while acting as attorney for the Estate of Elsie Grammer. More specifically, the Respondent is charged with violating Disciplinary Rules 1-102 (A) (4) and (6) of the Code of Professional Responsibility by filing and swearing to a false and misleading "Petition for Partial Distribution" in the Grammer Estate; with violating Disciplinary Rule 9-102(A) by commingling client's funds; and with violating Disciplinary Rule 7-101 (a) (3) by engaging in conduct which prejudiced and damaged John L. Smith.

Having examined all matters submitted in this cause, we now find that Respondent was admitted to the Bar of Indiana in 1951 and is engaged in the private practice of law.

On April 2, 1973, the Respondent and John L. Smith ("Smith") were appointed Co-Executors of the Last Will of Elsie M. Grammer. Respondent was also the attorney for the Estate. The Co-Executors quali-

fied, gave their joint and several surety bond in the sum of $75,000, and commenced the administration of the Estate. The will provided a $1,000 cash bequest to the testatrix's cousin, James Edward Smith, and the rest, residue and remainder was given and bequeathed to Smith. The estate consisted of real and personal property having an approximate value aggregating in excess of $100,000.

Smith desired a partial distribution of his share prior to the closing of the Estate in order to purchase a residence for himself and requested Respondent on several occasions to provide the partial distribution. The Respondent advised Smith in substance that no partial distributions would or could be made within six (6) months of the opening of the Estate because such was the period of time within which claims or a will contest could be filed. After six (6) months, Smith again requested the Respondent to permit a partial distribution to Smith of $45,000.

Respondent was concerned about his personal liability to taxing authorities in the event distributions to Smith rendered the Estate unable later to discharge then unforeseen tax liabilities and in the event a recovery from Smith could not be made.

The Estate was solvent, but Respondent had information that the deceased had been "generous" to Smith before her death and the Respondent thought that additional tax liability to the Estate could arise from predeath transfers.

Respondent consulted a Terre Haute CPA for advice and was told that, conceivably, the Respondent could incur some personal responsibility by making a premature distribution before the receipt of final tax clearances. Respondent informed the CPA that Respondent was considering an arrangement whereunder a portion of the distribution would be placed with the Respondent in escrow, so that the Respondent would be held harmless if the Estate was financially unable to pay potential tax claims due to a deficiency in estate funds created by the advance distribution. The CPA advised the Respondent that the escrow proposal sounded like an excellent and proper way to handle the manner.

In October, 1973, Respondent and Smith again discussed the partial distribution desired by Smith. Following this discussion a "Petition for Partial Distribution" was filed in the Vigo Circuit

Court. The petition, inter alia, stated as follows:

> "That said John Smith has an urgent need for part of the money coming to him and is desirous of having $45,000.00 of his bequest paid over to him at this time as partial distribution of what he'll having coming at the close of this estate, and no possible hazard or danger could come to any creditor, devisee or anybody by him receiving this money at this time."

There was no mention in the petition of any escrow agreement. The Court approved the partial distribution. At the time this pleading was filed, the Respondent was serving as Probate Commissioner of the Vigo Circuit Court.

The partial distribution of $45,000 was drawn by the co-executors in two checks payable to Smith, one for $30,000 and the second in the amount of $15,000. Smith kept the $30,000 check but returned the $15,000 check to the Respondent after endorsement. The Respondent either deposited the $15,000 in his personal checking or savings accounts, purchased bonds or other investment paper, or otherwise utilized the proceeds as his own. By the Respondent's own admission, he considered the funds his own to do with as he pleased, subject only to a claimed

escrow arrangement and to his duty to repay the principal amount of $15,000 to Smith at the time of final distribution of the Estate.

Thereafter, three (3) additional partial distributions were made to Smith by the co-executors without petition or court order. The dates of such distributions, and the amount of each, were as follows:

Date	Amount
February 21, 1974	$ 7,500.00
May 23, 1974	15,000.00
May 8, 1975	15,000.00

On the occasion of each additional partial distribution, the Respondent obtained from Smith one-third (1/3) of such distribution. As in the case of the initial distribution, the Respondent did not recall, nor was he able to reconstruct from his records, what he did with the additional $12,500 he received from Smith between February 21, 1974, and May 8, 1975. He either deposited such monies in his personal checking or savings accounts, purchased bonds or other investment paper, or otherwise utilized the monies as his own. By May 8, 1975, the Respondent had obtained

from Smith a total of $27,500. At no time did Smith know of, or inquire into, the whereabouts of any of the funds (or their proceeds) he had given the Respondent at the time of the various partial distributions.

There was substantial delay in closing the Estate. The Final Report was eventually filed on November 19, 1975, and set for hearing on December 10, 1975. Smith appeared at the scheduled hearing and, with the help of the then Probate Commissioner, filed his sworn objections to the Final Account wherein he stated that he had received only two-thirds (2/3) of the amounts for which he had given the Respondent receipts. A hearing on Smith's objections to the Final Report was scheduled for January 8, 1976. However, on December 17, 1975, Smith and the Respondent appeared before the Judge of the Vigo Circuit Court and filed a "Verified Stipulation of Facts and Dismissal of Objection to Final Report" which had been authored by the Respondent. On the same day, Smith received from the Respondent the sum of $27,500, the principal amount paid by Smith to the Respondent out of Smith's partial distributions.

In his Petition for Review, Respondent has asserted that the funds given to him were received under a written escrow agreement freely consented to by Smith and were secured by government securities issued in the name of the Respondent. It appears to us, however, that Respondent's emphasis on a written agreement is misplaced.

Respondent has been charged with violating Disciplinary Rule 9-102 (A) which provides as follows:

> D.R. 9-102 Preserving Identity of Funds and Property of a Client.
>
> (a) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein ...

The evidence in this case demonstrates that the funds received by the Respondent from the partial distributions were not deposited in a separate account, were commingled with his own funds and were treated as his own. The Respondent made no accounting of the funds to Smith or the Estate; in fact, it appears that the

Respondent considered this money to be his own, subject only to repayment of the principal amount. If it was the Respondent's intent to safeguard the Estate from unknown tax consequences, he could easily have done so by leaving a sufficient balance in the Estate. This procedure would have produced income for the Estate, not the Respondent.

By reason of the foregoing findings of fact, this Court now must conclude that the Respondent violated Disciplinary Rule 9-102 (A) as charged under the Verified Complaint filed in this cause.

We further conclude that by filing the Petition for Partial Distribution in the Estate of Elsie M. Grammer under the facts as found by this Court in this case, the Respondent engaged in conduct involving a misrepresentation to the Court adversely reflecting on his fitness to practice law. Accordingly, we now find that the Respondent has violated Disciplinary Rules 1-102 (A) (4) and (6) as charged in the Verified Complaint.

Lastly, we must additionally conclude that by diverting income producing assets from the Estate of Elsie M. Grammer to the personal benefit of himself, the Respon-

dent prejudiced the interests of his client and thereby violated Disciplinary Rule 7-101 (A) (3) of the Code of Professional Responsibility.

Having concluded that the Respondent engaged in unprofessional and unethical conduct, this Court, as required by the Constitution of this State, must impose an appropriate disciplinary sanction. In the pleadings filed in this cause, many fine citizens and highly respected members of the Bar of Indiana have recounted the past accomplishments of the Respondent and asked this Court for leniency. We have not ignored this testimony. But past performance and accomplishments cannot, by themselves, determine the sanction to be imposed. The interests protected by enforcement of professional conduct are much greater and extend to broad social concerns. This Court must weigh these broader considerations as well as the impact discipline will have on an individual.

The evidence in this case demonstrates a total lack of understanding of the professional standards which must be strictly maintained when an attorney is responsible for the management of his client's funds. The practice of law

regularly places a lawyer in a situation where he controls the funds of another. As in the case of an estate, it may be likely that this client will not understand the circumstances surrounding the distribution of these funds. The lawyer must truly be a fiduciary and the standard imposed by the Code of Professional Responsibility unequivocally sets forth the conduct expected of every attorney; he must deposit his client's funds in an indentifiable bank account in this State and must not deposit any personal funds in this account.

It is clear from the record that the Respondent did not sufficiently segregate himself from the funds of his client. Unfortunately, this is not merely a case of poor accounting practices, but appears to be a deliberate course of conduct whereby an attorney chose to make a personal gain at the expense of his client, the Estate. This strikes the Court as a shocking lack of understanding of the fiduciary responsibilities placed on all members of the Bar of this State.

In light of the above consideration, this Court now finds that in order to preserve the integrity of the Bar of this State and in order to demonstrate this Court's

total abhorrence of the acts of misconduct present in this case, the strongest sanction permitted must be imposed in this case. It is therefore ordered that the Respondent be, and he hereby is, disbarred as an attorney in the State of Indiana.

Cost of these proceedings are assessed against the Respondent.

DeBruler, J., would impose a suspension of not less than three years in this case.

2. Order Denying Relief

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	Cause No. 877 S 602
JOHN A. KESLER	)	

ORDER DENYING RELIEF

Comes now the Respondent and files his "Petition for Rehearing, Request for Reconsideration and Request for Oral Argument" and "Petition to Submit Newly Discovered Evidence and Affidavit of Rose Edington". There has also been filed in this cause a "Supplement to Petition for Reconsideration by Respondent Pro Se", "Petition of Amicus Curiae", and "Joinder in Petition for Reconsideration and Brief By Amicus Curiae".

This Court, being duly advised, now finds that the relief prayed for in the petitions filed under this cause should not be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the "Petition

for Rehearing, Request for Reconsideration and Request for Oral Argument", "Petition to Submit Newly Discovered Evidence and Affidavit of Rose Edington", "Petition of Amicus Curiae" and "Joinder in Petition for Reconsideration and Brief By Amicus Curiae" are now denied.

DONE at Indianapolis, Indiana, this 20th day of February, 1980.

s/ Richard M. Givan
Richard M. Givan
Chief Justice of Indiana

All Justices Concur.

APPENDIX B

CONSTITUTION OF THE UNITED STATES, AMENDMENT 14

§ 1. Citizenship --- Due process of law --- Equal protection.--- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

CODE OF PROFESSIONAL RESPONSIBILITY - DISCIPLINARY RULES

DR 1-102 Misconduct.

(A) A lawyer shall not:

* * * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

* * * *

(3) Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B).

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently

or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

ADMISSION AND DISCIPLINE RULE 23. DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 1. General Principles

Each person granted the privilege to practice law in this State has the obligation to conduct himself at all times in a manner consistent with the trust and confidence reposed in him by this Court and in a manner consistent with his duties and responsibilities as an officer or judge of the courts of this State. This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this Court or who practices law in this State (hereinafter referred to as "attorney") is charged with misconduct. The procedures hereinafter

set forth shall be employed and construed to protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct.

The term "attorney" as used in this rule shall include, in addition to all persons admitted to the bar of this Court, or who practice law in this State, any and all judges of any and all courts of this State now in existence or hereafter created or established.

* * *

Section 3. Type of Discipline and Suspension

(a) One of the following types of discipline may be imposed upon any attorney found guilty of misconduct: permanent disbarment from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite or an indefinite period from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite period, not to exceed six months, from the practice of law with provision for automatic reinstatement upon such conditions as the Court shall specify in the order of

suspension; a public reprimand; or a private reprimand.

* * * *

(c) In cases of misconduct or disability, this Court may, in lieu of permanent disbarment or suspension place a lawyer on probation and permit him to continue practicing law if in its opinion such action is appropriate and desirable. In such event, the lawyer will be subject to such conditions, limitations and restrictions as this Court may see fit to impose, and upon a violation of such conditions, restrictions or limitations, said attorney may be suspended or disbarred.

Supreme Court, U. S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-1821

IN THE MATTER OF JOHN A. KESLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MEMORANDUM OPPOSING CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

Respondent, Indiana Supreme Court Disciplinary Commission, by counsel, respectfully submits that the Petition For Writ Of Certiorari filed herein should be denied.

This matter arises out of the Petitioner's disbarment as an attorney in the State of Indiana. **In Re Kesler** (1979), _____ Ind._____, 397 N.E.2d 574. The facts upon which the subject disbarment was premised are not as contained within the Petitioner's "Statement", but rather are as set forth in the opinion of the Supreme Court of Indiana that is Appendix A to the instant petition.

In his Reasons For Granting The Writ, the Petitioner first asserts in conclusory fashion that under the Fourteenth Amendment to the United States Constitution the sanction of disbarment was unconstitutionally harsh in his case. The Petitioner claims that other Indiana lawyers have been given a lesser sanction for more egregious misconduct. The Petitioner has wholly failed to cite any authority for the proposition that this Court somehow has jurisdiction to review the determination of the Supreme Court of Indiana as to the type of sanction to impose upon a lawyer who has been found to have engaged in professional misconduct. The Respondent has wholly failed to make any showing of a "substantial federal question" or any "special and important reason" such as would invoke the jurisdiction of this Court and call for a review of the decisions below.

The Petitioner's second contention is that the Supreme Court of Indiana was precluded from sanctioning him because a local Indiana Probate Court that had jurisdiction of the estate proceeding that underpined the disbarment action had exonerated the Petitioner before the disbarment action was commenced. The Petitioner's claim here is one of collateral estoppel. However, the Petitioner has failed to cite a single Federal or State constitutional provision, statute, case precedent, rule or regulation in support of this second contention. Therefore, such contention presents no substantial federal question and does not invoke the jurisdiction of this Court.

For the above reasons, it is manifest that this Court lacks jurisdiction to review the judgments below and that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

INDIANA SUPREME COURT
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